(31)

No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., et al.,
Petitioners,

—v.—

GEORGE WINDSOR, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS ROBERT A. GEORGINE, et al. AND THE PLAINTIFF CLASS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

PARTIES TO THE PROCEEDING

The respondents who join in this brief are the named plaintiffs and class representatives, Robert A. Georgine; Laverne Winbun, Executrix Of The Estate Of Joseph E. Winbun, Deceased, And In Her Own Right; Ambrose Vogt, Jr.; Joanne Vogt, His Wife; Carlos Raver; Dorothy Raver, His Wife; Timothy Murphy; Gay Murphy, His Wife; Ty T. Annas; Anna Marie Baumgartner, Executrix Of The Estate Of John A. Baumgartner, Deceased; Nafssica Kekrides, Individually And As Administratrix Of The Estate Of Pavlos Kekrides, Deceased; William H. Sylvester, Executor Of The Estate Of Fred A. Sylvester, Deceased, individually and on behalf of all others similarly situated. The other parties to the proceeding are set forth at Pet. App. 292a-317a.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 83 F.3d 610. The opinion and order of the district court granting the preliminary injunction (Pet. App. 67a-87a) are reported at 878 F. Supp. 716. The opinion and order of the

* The plaintiff class members, though allied with petitioners in seeking reversal of the judgment below, are technically respondents herein because they were not parties to the petition for certiorari. *See* Sup. Ct. R. 12.6. For ease of reference, the term "respondents" as used in this brief refers only to those respondents (the Objectors below) who support the judgment below, while the respondent plaintiff class members are referred to as the "Plaintiff Class."

district court approving the settlement and certifying the class (Pet. App. 88a-276a) are reported at 157 F.R.D. 246.

JURISDICTION

The judgment of the court of appeals (Pet. App. 277a-282a) was entered on May 10, 1996, and a timely petition for rehearing was denied on June 27, 1996 (Pet. App. 283a-288a). The petition for a writ of certiorari was filed on August 19, 1996, and was granted on November 1, 1996. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Pertinent provisions of Federal Rule of Civil Procedure 23 are set forth in the addendum to this brief.

STATEMENT

The issue in this case is whether the Federal Rules of Civil Procedure forbid the federal courts from approving a class *settlement* of claims — no matter how fair that settlement may be — unless those claims would also qualify to be *litigated* on a class basis. Conceding the settlement at issue here to be "arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue" (Pet. App. 18a), and admitting that "the better policy" might be to allow such a settlement (Pet. App. 19a), the court below nonetheless held that the Federal Rules *required* the settlement's invalidation. It read Rule 23 as imposing a flat requirement that a court considering certification of a settlement class must ignore the settlement, and may instead consider only the hypothetical facts and circumstances that would have existed if there were no settlement and the "case were to be litigated." Pet. App. 19a. The court below, however, was silent as to what language in Rule 23 it thought to

have enacted this counterintuitive requirement, and its holding in this regard is belied by the text and purposes of that Rule, by settled practice and by the decisions of every other court to have considered the point.

The pertinent facts and procedural history underlying this case are largely set forth in the brief being concurrently submitted by petitioners, and will not be repeated at length here. Instead, we briefly address here respondents' repeated reckless and unsubstantiated assertions (most recently advanced on opposition to certiorari) about the adequacy of Class Counsel, about the negotiations leading to the settlement in this case and about the settlement itself.

Respondents' assertions are, to begin with, completely irrelevant to the issue before the Court: the court below did not pass upon any of respondents' insinuations, instead adopting the broad position that Rule 23 bars this settlement no matter how well class counsel represented the class in achieving it. Beyond this, however, respondents' allegations are all flatly refuted by the thorough and considered findings of the district court.

1. The fairness hearing and the district court's findings of fact.

After affording objectors "unprecedented discovery" (Pet. App. 269a), during which "thousands of pages of documents were produced and over thirty depositions took place" (Pet. App. 101a n.8), the district court held a fairness hearing that "was extensive and protracted, involving the testimony of some twenty-nine witnesses (live or by deposition) during 18 hearing days over a period of over five weeks." Pet. App. 101a. Respondents had full opportunity to participate in this hearing, including putting on witnesses themselves and cross-examining those testifying in favor of the settlement. The hearing addressed all of their central accusations: those concerning "the competence and adequacy of Class Counsel," "the negotiation and operation of the proposed settlement"

and "the negotiation and operation of settlements reached between Class Counsel and the CCR defendants to settle in the present tort system the inventory of pending claims of clients represented by Class Counsel and their affiliated law firms." Pet. App. 101a-102a.

Following this elaborate hearing, "voluminous post-hearing submissions" by all of the participants and "day-long final oral arguments" (Pet. App. 102a), the district court issued an exhaustive opinion containing 300 paragraphs of factual findings. Pet. App. 103a-223a. These findings expressly rejected respondents' claims of collusion and improper conduct by Class Counsel, and also found respondents' expert witnesses to be "unpersuasive" (Pet. App. 126a), "immoderate" (*id.*), lacking in relevant experience (Pet. App. 198a), and devoid of any credible evidence in support of their opinions (Pet. App. 210a-216a).*

Not a single one of these findings was set aside or even questioned by the court of appeals. It is these findings — and not respondents' innuendo — that form the facts of record before this Court. *See, e.g., Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986) (district court factual findings are binding absent properly supported appellate determination that they are clearly erroneous). And those findings show respondents' insinuations for what they are:

* The district court in particular rejected the opinions given by two law professors (Susan Koniak and John C. Coffee, Jr.) on whose testimony and subsequent writings respondents relied heavily in their oppositions to certiorari. It determined that Professor Koniak "is not a class action expert, and was generally unfamiliar with the asbestos litigation . . . when she agreed to be an expert witness in this case" (Pet. App. 197a), and that she did not know or understand the facts (JA 198a, 202a, 203a). It also rejected Professor Coffee's conclusions as "unpersuasive" (Pet. App. 214a) on the grounds that they were based on "no credible evidence" and "no . . . data at all" (Pet. App. 211a-212a), that Professor Coffee was unaware of and "did not know or consider" the true facts (Pet. App. 212a, 214a), that his views were "not supported by the record evidence" (Pet. App. 213a), and that he was "not qualified" to draw the conclusions that he did (Pet. App. 214a).

baseless attempts to divert attention from the unsupportable legal conclusion reached by the court below.

2. The district court's findings regarding the selection of class counsel.

Respondents have contended that Class Counsel — three of the most prominent members of the plaintiffs' asbestos bar — were actually "hand picked" by the CCR as part of an alleged collusive scheme. The district court found just the opposite, terming Class Counsel to be "unquestionably experienced, highly respected leaders of the plaintiffs' asbestos bar" who were "extraordinarily competent" to represent the class. Pet. App. 258a, 271a. All three counsel "had played prominent roles in representing thousands of asbestos victims in various national proceedings." Pet. App. 177a. Two of them — Messrs. Motley and Rice — are members of a law firm that "was widely known . . . to represent more asbestos victims . . . than any other law firm in the country" and "had been involved in all the major events in the asbestos litigation"; the third, Mr. Locks, "also had played a prominent role in various national matters for asbestos victims." Pet. App. 178a.*

The district court also found that, far from respondents' sinister portrayal, counsel's involvement in this case arose from a "natural" evolution from Multidistrict Litigation ("MDL") proceedings in the Eastern District of Pennsylvania. Pet. App. 113a. In 1991, the Judicial Panel on MDL transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for coordinated pretrial

* For example, Messrs. Motley's and Rice's firm had participated in consolidated asbestos trials, class actions and bankruptcies (including the Manville bankruptcy proceeding). Mr. Motley had personally served for twenty years as Chair of the Asbestos Litigation Group, a national organization of asbestos plaintiffs' counsel, and had been active in representing unions whose members had been occupationally exposed to asbestos over the years. Pet. App. 178a. Mr. Locks was actively involved in both the Manville and Unarco bankruptcy proceedings, and had served as Chairman of the Board of UNR.

proceedings. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). Thereafter, Messrs. Motley and Locks were elected by their colleagues in the plaintiffs' asbestos bar to serve as co-chairs of the plaintiffs' MDL Steering Committee, and were appointed to that position by the MDL Judge (Honorable Charles R. Weiner).* Following this appointment, at the urging of Judge Weiner and other members of the federal judiciary, Messrs. Motley and Locks undertook lengthy negotiations with counsel for all of the major asbestos defendants, seeking an "all-encompassing" settlement of the "asbestos mess." Pet. App. 111a, 113a-115a, 270a-271a; *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. at 424.

By November 1991, however, it became evident that the MDL settlement talks would not lead to a global resolution of all asbestos litigation against all defendants nationwide. Accordingly, CCR decided to pursue independent global settlement negotiations on its own behalf and, toward that end, to "continue the discussions" with Messrs. Motley and Locks, along with Mr. Motley's partner, Mr. Rice. Pet. App. 115a, 177a-179a.

Indeed, the district court found that CCR's decision to "continue the discussions" with these three lawyers was not only a "natural" but a potentially *necessary* one: a settlement of the sort under discussion could have credibility with the plaintiff's bar and be approved by the courts under Rule 23(e) only if class counsel were the most respected and experienced plaintiffs' asbestos attorneys; as the district court put it, if CCR "wanted to succeed in reaching a global settlement that a Court would approve, they had no choice but to hope to negotiate with such counsel." Pet. App. 258a; *see also* Pet. App. 179a.

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* It was Judge Lowell Reed, however, not Judge Weiner, who was the district judge below and approved the class certification and settlement herein.

These are the *only* reasons why CCR negotiated this settlement with Class Counsel as opposed to other, potentially less-qualified attorneys. As the district court found on the full record:

> CCR commenced negotiations with Class Counsel based on their reputation and experience in the asbestos litigation. There is *no* suggestion in the exhaustive discovery and litigated record that CCR executives or attorneys met and decided to "choose" plaintiffs' counsel with the largest inventory of unsettled claims in order to facilitate a global settlement by creating an atmosphere of collusion. *That never happened.*

Id. (emphasis added).

3. The district court's findings regarding class counsel's conduct of the settlement negotiations.

Equally without merit are respondents' accusations of collusion once the negotiations commenced. The year-long negotiations that led to this settlement were, as the district court found, "difficult, lengthy, and time-consuming. . . . Virtually no provision of the Stipulation [of settlement] was not the subject of significant negotiation. The terms of the Stipulation changed substantially during the negotiations." App. 116a. In particular, the district court noted the hard-fought nature of the negotiations concerning the medical criteria to govern compensation under the settlement, criteria about which respondents complain at length. Indeed, negotiations on that subject alone lasted several months and, in the end, "changes were made in the medical criteria that made them more favorable to claimants." App. 118a.

In conducting these "protracted and vigorous" negotiations, class counsel were able to draw on their own "many years of extensive and sophisticated experience" with asbestos litigation: as the district court put it, "the asbestos litigation [is] probably the most mature mass tort litigation in this country,"

and the "liability and medical issues had been the subject of massive discovery and trial and settlement experience, the results of which were known to Class Counsel." Pet. App. 118a, 115a. But class counsel did not rest on this extensive body of knowledge alone; instead, they demanded and obtained "a substantial exchange of information," including "confidential data" — never before shared with any plaintiffs' counsel — concerning the CCR defendants' historic settlement averages and the numbers of claims settled and filed against the CCR defendants over time. Pet. App. 116a-117a. Class Counsel also were able to obtain information regarding the insurance coverage available to CCR members, and employed consultants who met with representatives of the firm that handles all insurance billing and coverage analysis for CCR members. Consultants for Class Counsel also met with financial personnel of the individual defendants. Finally, class counsel consulted other members of the plaintiffs' asbestos bar to obtain their views on various provisions of the proposed settlement. Pet. App. 117a.

4. The district court's rejection of respondents' allegations of conflicts of interest

Perhaps the most pervasive (and scurrilous) accusation levelled by respondents is that Class Counsel's representation of the class of future asbestos claimants was compromised by their pre-existing representation of individual asbestos plaintiffs in presently pending cases. The district court squarely rejected this contention, finding — consistent with the testimony of Yale (now University of Pennsylvania) Law Professor and American Law Institute Director Geoffrey Hazard and University of South Carolina Law Professor John P. Freeman — that Class Counsel "acted responsibly, diligently, and ethically in representing their present clients while negotiating on behalf of the . . . class." Pet. App. 188a-189a.*

* The court, moreover, specifically rejected the contrary testimony offered by an objectors' expert on this issue, on the grounds that the "credible evidence in the record [did] not support his factual predicate" for his opinions and that he "ha[d] no asbestos litigation experience, or any litigation experience, and has had no experience as a lawyer or expert in mass tort cases." Pet. App. 184a.

The heart of respondents' allegations is the unsubstantiated and expressly rejected assertion (repeated on opposition to certiorari) that Class Counsel settled their "inventory" of presently pending cases against the CCR defendants at a premium, and then proceeded to "sell out" the class. What they do not reveal, however, is that at the very outset of the case, at the parties' request, the district court appointed a independent Special Master — Professor Stephen Burbank of the University of Pennsylvania Law School — to evaluate these inventory settlements. Professor Burbank conducted a meticulous inquiry; his conclusions, as stated and adopted by the district court, were that the inventory settlements "were generally consistent with the historical settlement averages for comparable settlements with CCR, were not inflated, did not include a premium paid to Class Counsel in exchange for the [class] settlement, and were not the product of collusion." Pet. App. 213a. The district court's further findings on the subject included that:

— "Class Counsel did not enter into the *Georgine* negotiations for the purpose of settling their pending cases."

— "the settlement of the inventory cases was not conditioned upon an agreement being finally reached in *Georgine*. It is clear on the face of the inventory settlement agreements, that if the Stipulation of Settlement had not been concluded after the negotiation of the inventory settlements, the inventory settlements nevertheless remained in full effect."

— "in negotiating the inventory settlements for the present clients and the *Georgine* Stipulation for the futures class, Class Counsel and CCR bargained vigorously and at arms-length. The settlements

> reached for both groups of claimants were not negotiated against each other, and Class Counsel worked diligently to negotiate what they considered to be the best possible settlements achievable for each group of claimants."

App. 183a, 189a.*

In short, the evidence and the district court's findings demonstrate that Class Counsel did no more than accept a fair settlement offer for their present clients — something that they were under an *ethical duty* to those clients to do — and that their having done so in no way affected their representation of the class. Indeed, since no plaintiff's attorney could ethically refuse to settle his present cases on the ground that he was also representing a class of future claimants, the upshot of respondents' allegation is the bizarre proposition that such a class may be represented only by attorneys without any current practice in the particular field at issue, to the class's obvious detriment. It is thus not surprising that — as the Third Circuit itself noted — "Judge Reed resolved th[e] issue [of a claimed sell-out of the class by conflicted counsel] in favor of class counsel," and did so "largely on the basis of fact findings that the objectors *have not challenged*." Pet. App. 49a (emphasis added).

Respondents have also raised one other purported conflict: the claim that Class Counsel had, as part of the inventory settlement agreements, contractually bound themselves not to file future claims that did not meet the class settlement's minimum medical criteria. But the district court expressly found

* Respondents' allegations are factually unfounded for two further reasons. *First*, contrary to their implicit suggestion, "inventory" settlements of a law firm's present cases against a defendant are not uncommon in the asbestos litigation — indeed, as the district court noted, petitioners have entered into such settlements with numerous other plaintiffs' attorneys who are not affiliated with class counsel. JA 182a. *Second*, class counsel did *not* settle their entire inventory of present cases with petitioners; they have many thousands of such cases remaining unresolved.

that these so-called "futures" provisions complained of by respondents contained no such contractual promise,* and — consistent with the testimony of Professors Freeman and Hazard and that of Professor Samuel Dash (of Georgetown University) — that these provisions were ethically proper and gave rise to no conflict of interest. Pet. App. 189a-196a. Indeed, as the district court found, counsel entered into the agreements containing the futures provisions only after obtaining (and following) expert ethics advice regarding those provisions. Pet. App. 189a.

5. The district court's findings regarding the benefits provided by the settlement.

Respondents' final effort to tarnish the conduct of class counsel consists of a series of unsubstantiated aspersions on the settlement itself. The district court's finding that this settlement is fair to the class is not before the Court (nor, for that matter, was it before the court below). Nonetheless, it should be noted that respondents' implicit assertions that class members had nothing to gain in a class settlement are once again totally contrary to the findings of the district court. As the district court found:

(a) the settlement "should" reduce the substantial delays that mark the tort system, in which, "on average, claims against the CCR defendants . . . take almost three years to resolve, and . . . delays in certain jurisdictions are much longer." Pet. App. 139a & n.23; 144a.

(b) the settlement would greatly reduce the immense transaction costs that have plagued the tort system,

* Rather, the district court found, the complained-of provisions reflected only counsel's good faith commitment to *recommend* to their tort system clients — in accordance with "their own independent professional judgment" — that claims not meeting the minimum medical criteria should not be filed. Pet. App. 198a.

in which such "costs exceed the victims' recovery by nearly two to one." Pet. App. 106a, 139a.

(c) the settlement would cap plaintiffs' attorney's fees at 20-25%, far less than the "33-40% contingency fee contracts [that] are the norm in the asbestos litigation." Pet. App. 139a n.23, 158a.

(d) the settlement would establish a practice of "limited release" — whereby class members who receive compensation for a non-malignant disease could obtain additional compensation if they subsequently were to develop a malignant disease. This likewise contrasts with tort system practice, in which over 90% of the settlements of non-malignant claims require *full* releases from the claimants. Pet. App. 155a.

(e) the settlement would create a simplified process in which claimants could quickly obtain compensation without the risks of litigation, again in sharp contrast to the tort system's tendency to produce huge recoveries for some and inadequate recoveries for others. Pet. App. 13a-14a, 176a.

These benefits, however, were simply deemed irrelevant by the court below. In that court's view — even where the federal courts are beset by tens of thousands of similar cases, even where the plaintiffs in those cases could be greatly benefitted by a class settlement, and even where a potentially fair such settlement is in fact proposed — the federal courts are powerless to approve and implement that settlement unless the claims could be litigated as a class action. As we now show, there is absolutely no basis for that view.

SUMMARY OF THE ARGUMENT

The holding of the court below — that in determining whether to certify a settlement class the court must ignore the

settlement and address certification as if the action were hypothetically going to be litigated — is as unsupported as it is counterintuitive. It would radically transform established practice, under which actions are routinely settled on a class basis where questions would exist as to whether they could be litigated on that basis, and would thereby create a major obstacle to the best and most efficient means of resolving disputes: fair settlements among the parties.

It would do this, moreover, without any good reason at all. The text and purposes of Rule 23 plainly instruct the district courts to consider class certification based on the actual circumstances before them — here, the settlement — and not based on some imaginary litigation that by definition is not going to occur. Likewise, the court below's speculative fear of collusive settlements is fully addressed by Rule 23(e)'s requirement that the district court and court of appeals find a class settlement to be fair and non-collusive prior to approving it. The concerns raised by the court below — whether founded or otherwise — are thus addressed by thorough application of the *existing* requirements of Rule 23(e); they do *not* warrant its revisionist and tortured reading of the remainder of the Rule, or the massive roadblock it has thereby established to fair settlements that would greatly benefit plaintiff class members.

ARGUMENT

THE COURT BELOW ERRED IN READING RULE 23 TO REQUIRE THAT COURTS MUST IGNORE THE EXISTENCE OF A SETTLEMENT IN DETERMINING WHETHER TO CERTIFY A SETTLEMENT CLASS.

The linchpin of the decision below is the Third Circuit's unique rule that courts addressing class certification in cases where a settlement has been reached must do so "as if the

case were going to be litigated" (Pet. App. 36a) — *i.e.*, they must ignore the *actual* posture of the case and pretend that no settlement exists.* As demonstrated below, this inflexible and counterintuitive approach flies in the face of the decisions of every other Circuit to address the issue; cannot be squared with the text or purposes of Fed. R. Civ. P. 23; is totally at odds with longstanding practice under that Rule; and disserves the very policy concerns cited by the Third Circuit as a basis for crafting that approach. Moreover, in the name of protecting plaintiffs, it would in many circumstances require the federal courts to invalidate even the most beneficial and noncontroversial settlements in favor of wasteful, repetitive individual litigation that disserves the interests of plaintiffs, defendants and the courts themselves.

A. The Third Circuit approach is contrary to the text and purposes of Rule 23.

Every Circuit to address the issue, other than the Third, has reached the common-sense conclusion that courts must apply the Rule 23 class certification criteria to the actual facts and circumstances of the case before the court — including the fact of settlement, where one has been reached. As the Fifth Circuit recently observed, in rejecting the Third Circuit's approach and certifying a settlement class of asbestos plaintiffs, "[m]ost circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied," and "[o]nly the Third Circuit has refused to look at settlements before it when deciding class certification issues." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996), *citing White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("adequacy of class representation . . . is ultimately determined by the settlement

* The Third Circuit first created this standard in its 1995 opinion in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.) ("*GM Trucks*"), *cert. denied sub nom. General Motors Corp.* v. *French*, 116 S. Ct. 88 (1995). Both *GM Trucks* and the opinion below were authored by the same circuit judge.

itself"), *cert. denied*, 115 S. Ct. 2569 (1995); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself"); and *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.) ("if not a ground for certification per se, certainly settlement should be a factor, and an important factor to be considered when determining certification"), *cert. denied*, 493 U.S. 959 (1989).*

The leading treatise on class actions endorses this near-universal approach: "Class action determinations are made in the context of *all the circumstances* of the case *as it is then postured*. . . . Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty in reaching this determination in a different context." 2 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 11.27, at 11-54 to 11-55 (3d ed. 1992) (hereinafter "NEWBERG ON CLASS ACTIONS") (emphasis added). *Accord* MANUAL FOR COMPLEX LITIGATION (THIRD) 236 (1995).

This overwhelming authority rejecting the Third Circuit's approach** is, in and of itself, sufficient reason to reject that

* *See also Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (approving class settlement despite "serious doubts . . . whether all aspects of this cause could have been litigated to a conclusion entirely within the class action mode," because "certification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light"); *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985) citing, in upholding class certification, "the interests of the members of the broadened class in the settlement agreement"), *cert. denied*, 475 U.S. 1143 (1986); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (Wisdom, J.) (stating that "it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context"), *cert. denied*, 452 U.S. 905.

** A more complete listing of the extraordinary number of cases rejecting the Third Circuit's approach is compiled in the Brief for Petitioners.

approach. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975); *see also Owen* v. *Owen*, 500 U.S. 305, 310 (1991) (relying on "uniform practice of bankruptcy courts" in rejecting proposed contrary rule). Moreover, the authority for considering the fact of settlement in determining whether to certify a class is not only weighty. It is also plainly correct.

1. The Third Circuit's approach lacks any support in the language of Rule 23. Rule 23(a), for example, requires only common "questions," typical "claims or defenses" and "fair[ ] and adequate[ ] protect[ion]" of absent class members' "interests." *Nothing* in the language of the Rule states (1) that the common questions and typical claims may not arise from a settlement, or (2) that a district court must blind itself to the terms of a settlement that the class representatives were actually able to achieve on absent class members' behalf, and to the manner in which that settlement was negotiated, in determining whether those class members' "interests" were "fairly and adequately protect[ed]." And Rule 23 contains *no* language directing district courts to base their certification decisions on what a hypothetical, fully litigated class action would look like.

In light of this, in light of Federal Rule 1's overriding command that the Rules all "be construed and administered to secure the *just, speedy, and inexpensive determination of every action*" (emphasis added), and in light of the "overriding public interest in favor of settlement" of "class action suits,"* there is simply no basis for the court below's assertion that the "language" of "the current Rule 23 does not permit" consideration of the settlement in assessing class certification. Pet. App. 19a. Indeed, the Third Circuit's construction of that language is itself internally inconsistent: on the one hand, it has concluded that the Rule's language *permits* a court to certify a class for settlement purposes only,

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* *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *see also McDermott, Inc.* v. *AmClyde Inc.*, 114 S. Ct. 1461, 1468 (1994).

thereby necessarily *reserving* the question whether the action could proceed as a litigated class action (*see GM Trucks*, 55 F.3d at 792-93); but on the other hand, it has also held that the same language mandates that the same court ignore the settlement and determine class certification "as if the case were to be litigated" (Pet. App. 19a), thereby *deciding* the very question it was ostensibly reserving.

Moreover, the remainder of Rule 23 likewise demonstrates that certification decisions are practical, real-world determinations to be made in view of the *actual* circumstances of the case. For example, Rule 23(c)(1) authorizes district courts to "alter[ ] or amend[ ]" their initial rulings on class certification — *i.e.*, such rulings are subject to modification "*in the light of subsequent developments in the litigation*," *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 160 (1982) (emphasis added). This provision makes clear that the appropriateness of class certification is keyed to the *actual* posture of the case (and the fact of settlement is plainly part of the actual posture of the case), not to some hypothetical construct. Similarly, subdivision (b)(3) of the Rule directs the court to consider "the difficulties *likely to be encountered* in the management of a class action" (emphasis added) — and *not*, as it might have read under the Third Circuit's approach, "the difficulties that *would* be encountered, *if* the case were litigated to a conclusion, in the management of a class action."

By contrast, while proclaiming that its result was mandated by the language of Rule 23, the court below never specified the language to which it was referring. The closest it came was the statement that " '[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.' " Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799). This argument, however, is aimed at a straw man. Neither the Plaintiff Class nor petitioners have ever sought "separate" or "liberalized" Rule 23 criteria for settlement classes. Rather, what the Plaintiff Class seeks — and what Rule 23 commands — is merely the application of the *same*

criteria to settlement classes as are applied to all other classes. Those criteria remain the same; the court is simply entitled to consider *all* of the evidence relevant to them. For example, the Third Circuit's approach would have the district court assess attacks on the adequacy of class counsel's performance, such as those respondents have made throughout this case, by ignoring counsel's *actual* performance as reflected in the terms of a settlement that counsel was actually able to achieve for the class and in the conduct of the negotiations leading to that settlement.

To be sure, the Rule 23 criteria can often be met more easily in the settlement context than in the litigation context (*see, e.g.*, MANUAL FOR COMPLEX LITIGATION (THIRD) 236 ("it may be easier for settlement classes to satisfy Rule 23(a)")), but this is simply because the fact of settlement can increase the commonality of, or eliminate divergences in, class members' interests. Indeed, in *GM Trucks*, the Third Circuit itself conceded that "settlements can reduce differences among class members." 55 F.3d at 790.

For example, the court below found that common issues would not have predominated over individual issues, as required by Rule 23(b)(3), if this action were to be litigated because individual class members have different diseases, different work histories, different "knowledge and appreciation of the danger of breathing asbestos dust," different "lifestyles" and are subject to different "affirmative defenses." Pet. App. 40a-48a. But this calculus — whether common or individual issues predominate — is obviously greatly affected by the existence of a settlement that (a) reduces the number and significance of individual issues by, among other things, waiving certain affirmative defenses (such as specific causation) that would otherwise give rise to individual issues; (b) produces great *common* benefits to the class by way of reduction of delays, excessive transaction costs and risks that all class members face; and (c) gives rise to predominant common issues of fact and law regarding,

inter alia, the fairness of the settlement. The calculus is also changed with respect to reasons other than "predominance" that courts have cited for declining to certify mass tort litigation classes (*e.g.*, a perceived difficulty in satisfying constitutional jury trial requirements*): these concerns are simply not present in the settlement class context.

In short, as NEWBERG ON CLASS ACTIONS explains:

> It is true that some courts, in approving class settlements . . . have observed that the class might not have been certified were it not for the proposed class settlement. *This observation does not mean that Rule 23 criteria were not applied strictly in these circumstances.* On the contrary, these tests were applied, and *the observation that a different ruling might have resulted in the absence of the settlement offer refers to the fact that Rule 23 criteria would have been applied in a different context* and thus may have led to a different result.

2 NEWBERG ON CLASS ACTIONS § 11.27, at 11-54 to 11-55 (emphasis added). It is thus the court below, by *departing* from the usual rule that class certification decisions are to be made in light of actual circumstances, that is applying separate, *il*liberalized criteria to settlement class actions. This separate standard is utterly without basis in the language of Rule 23.

2. The correctness of the general rule that the existence of a settlement should be considered in class certification decisions is also confirmed by the *purposes* of the criteria set forth in Rule 23(a) and 23(b). These criteria — unlike their counterparts in the pre-1966 version of Rule 23, which determined the propriety of a class action by reference to "the abstract nature of the rights involved"** — were designed as

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* *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1302 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

** Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 98 (1966).

"*functional* tests." 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1753, at 42 (1986) (hereinafter "WRIGHT & MILLER") (emphasis added). Their purpose is to "describe in . . . *practical* terms the occasions for maintaining class actions." Advisory Committee's Note, 39 F.R.D. at 99 (emphasis added). As noted by the reporter to the Advisory Committee, "[t]he object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."* These purposes, and the "functional," "practical" approach of the current version of Rule 23, are far better served by considering the existence of a settlement than by ignoring it.

Thus, the principal purpose of the Rule 23(a) criteria (numerosity, commonality, typicality and adequacy of representation) is twofold: to determine, "*under the particular circumstances of the case*," (a) whether "maintenance of a class action is economical" and (b) whether absent class members "will be fairly and adequately protected" by the class representatives and class counsel. *Falcon*, 457 U.S. at 157 n.13 (emphasis added). In insisting that a settlement be ignored in conducting these inquiries, the Third Circuit thus would have a court (a) determine "economi[es]" with respect to a circumstance — a litigated class action — that by definition it will not confront; and (b) assess the "protect[ion]" provided by the class representatives and class counsel by blinding itself to some of the best evidence on that issue — the process by which the settlement was negotiated and the actual terms of the settlement.

This illogical result misperceives the point of Rule 23(a): congruence of interests between class members and their representatives is necessary only as to those issues that — "under

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* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 (1967).

the particular circumstances of the case" — are *actually* to be addressed in the class action. It therefore makes absolutely no sense "under the particular circumstances of [such a] case" to focus the class certification inquiry on hypothetical divergences of interest that are not presented (or, indeed, are mitigated) by the settlement, but that might possibly come to the fore in a fictional trial that will never take place.

Because the Rule 23(a) criteria thus aim to protect *actual* interests of the class members, it is only logical that the overwhelming majority of the courts to address the issue have chosen to apply those criteria in light of the *actual* facts before them — including the fact of settlement — rather than apply them to a hypothetical litigated action. "Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint." *In re Asbestos Litig.*, 90 F.3d at 975; *see also GM Trucks*, 55 F.3d at 796 (conceding that "evaluating the settlement can yield some information relevant to the adequacy of representation determination").

By contrast, the Third Circuit's mechanical approach — which focuses on whether class members' interests *would be* aligned in a hypothetical litigation, while studiously ignoring whether they *are* aligned in the actual case before the Court — "would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *In re Asbestos Litig.*, 90 F.3d at 975. It is difficult to imagine how a court's willfully blinding itself to one key circumstance of a case (settlement), while simultaneously pretending that nonexistent (trial-related) circumstances *do* exist, rationally advances the Rule 23(a) goal of determining whether, "under the particular circumstances" (*Falcon*, 457 U.S. at 157 n.13), class members' interests are adequately protected.

The need to focus on actual rather than hypothetical circumstances is, if anything, even more obvious with respect to

the requirements of Rule 23(b). By way of example, Rule 23(b)(3), the provision under which the class at issue here was certified, requires the court to base its decision on two criteria: (1) whether common questions "of law or fact" "predominate over any questions affecting only individual members," and (2) whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The purpose of these "predominance" and "superiority" criteria is overtly pragmatic: to determine whether "*the actual interests* of the parties can be served best by settling their differences in a single action." 7A Wright & Miller § 1777, at 516 (emphasis added).*

In a proposed Rule 23(b)(3) class action, in other words, the court is asked to weigh the advantages and disadvantages of proceeding on a class basis, and to decide whether, in light of all relevant circumstances, "the class action is the most efficient and effective means of settling the controversy." *Id.* § 1179, at 562. *See* Advisory Committee's Note, 39 F.R.D. at 103 (court's task under Rule 23(b)(3) is "to assess the relative advantages of alternative procedures for handling the total controversy"). The inherently practical nature of this determination, which requires the court to determine whether class resolution of the case will *in fact* serve the interests of the parties and of the system of justice as a whole, necessarily calls for the court to consider the actual circumstances of the class action that is before the court. In a case where there is a settlement, consideration of the merits of a hypothetical litigated class action cannot possibly result in an accurate assessment of these interests.

In fact, the Third Circuit's own analysis in the present case illustrates how disconnected its approach is from the purposes of Rule 23(b)(3). For example, the district court held, based

* *See also, e.g., Amalgamated Workers Union* v. *Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973) (the factors "pertinent to the two findings all relate to the desirability of having one suit instead of multiple suits . . . . [and] the advisory committee notes on the requirement focus on the question whether one suit is preferable to several").

on express findings of fact, that the class action settlement in this case was "superior to other available methods" within the meaning of the Rule because the settlement "will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system." Pet. App. 227a-228a. The Third Circuit — *without disputing the district court's conclusion that the class action settlement was more efficient than the available alternative methods of adjudication* — nonetheless held that for purposes of class certification the class action should be regarded as *in*efficient, stating (Pet. App. 54a):

> In terms of efficiency, a class of this magnitude and complexity could not be tried. There are simply too many uncommon issues, and the number of class members is surely too large. Considered as a litigation class, then, the difficulties likely to be encountered in the management of this action are insurmountable.

What the Third Circuit court did not (and could not possibly) explain is what conceivable relationship there is between the hypothetical difficulties of managing a hypothetical trial and the fundamental Rule 23(b)(3) purpose of promoting class resolution in those cases in which class resolution is *in fact* superior to alternative methods.*

B. The Third Circuit approach would greatly impede the settlement of class actions generally.

As this Court and other courts have often noted, there is a strong public policy favoring promotion and facilitation of settlement. *See, e.g., McDermott, Inc.* v. *AmClyde Inc.*, 114 S.Ct. 1461, 1468 (1994); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); Fed. R. Civ. P. 16(a)(5). This policy is

* Indeed, in *GM Trucks*, the Third Circuit *conceded* that "[i]n settlement situations, the superiority requirement arguably translates into the question whether the *settlement* is a more desirable outcome for the class than individualized litigation." 55 F.3d at 796 (emphasis added).

at its strongest — indeed it becomes "overriding" — with respect to class actions. *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981); *see Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

The Third Circuit explicitly recognized this overriding public policy interest, and in fact cited it in *GM Trucks* as its principal ground for upholding the permissibility of settlement classes. *See* 55 F.3d at 790-91 ("Settlement classes . . . increase the number of actions that are amenable to settlement"; "[i]n mass tort cases, in particular, use of a settlement class can help overcome certain elements . . . that otherwise can considerably complicate efforts to settle"; "a defendant considering a settlement may [otherwise] resist agreeing to class certification because, if the settlement negotiations should fail, it would be left exposed to major litigation"). Its ignore-the-settlement approach to certification of such classes, however, is totally at odds with these statements: that approach would throw great obstacles in the way of settlement, and would overthrow established practice regarding settlement of most class actions.

First, notwithstanding the Third Circuit's stated desire to facilitate class settlement of mass tort cases, its approach would make such settlements difficult, if not impossible, in many jurisdictions. Several courts of appeals have recently refused to certify certain mass-tort litigation classes. *See, e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). Whether or not those cases were correctly decided, the fact remains that, in those circuits, the court below's approach would preclude their *settlement* as well. The cases would simply *have* to be litigated individually — no matter what the burden on the

courts, no matter what the delays to the plaintiffs and no matter how beneficial to all involved an overall settlement would be.

Second, and more fundamentally, the Third Circuit's approach would cast doubt on routine practice with respect to settling *non*-mass-tort class actions. Even in those actions, such as securities fraud actions, that are regularly certified as litigation class actions, class treatment in a litigation context is potentially *not* appropriate with respect to the individual damages class members will receive. As the Advisory Committee's Note to Rule 23(c)(4) explains this practice:

> an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

39 F.R.D. at 106; *see also, e.g.*, *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D. Pa. 1979), *aff'd*, 685 F.2d 810 (3d Cir. 1982), *cert. denied sub nom. Alaska* v. *Boise Cascade*, 459 U.S. 1156 (1983); *In re Home-Stake Production Co. Sec. Litig.*, 76 F.R.D. 351, 372 (N.D. Okla. 1977); *Seiden* v. *Nicholson*, 69 F.R.D. 681, 686 (N.D. Ill. 1976).

These very actions, however, are *routinely* settled as to *all* issues, damages included. *See, e.g.*, *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268 (9th Cir. 1992) (approving class settlement of securities class action). Such settlements, however, would apparently be impermissible under the Third Circuit's approach, whereby parties may only settle on a class basis what they could litigate on that basis. Indeed, it is unclear how, under that approach, the majority of class actions could be settled at all, since rational parties — plaintiff or defendant — would rarely, if ever, agree to compromise liability without also settling damages. Nor, in the unlikely event that lia-

bility-only settlements would occur, would such settlements serve the public policy interests at stake — the burden, delay and risk of a spate of individual damages resolutions would remain unabated.

Third, even in those circumstances in which a class settlement would continue to be a theoretically viable option, it would be a practical impossibility. As noted above, the Third Circuit in *GM Trucks* identified as a primary benefit of, and justification for, settlement classes that defendants would be more willing to settle if doing so did not mean conceding the viability of a litigated class action against them. *See* 55 F.3d at 790. But if a defendant, in order to get a settlement approved, must agree that the criteria for a litigated class action are met — and if the court must so find — the purported reservation of rights becomes meaningless indeed. On *GM Trucks*' own logic, then, its approach would have the polar opposite effect of *deterring* settlement. This penalization of settlements, which applies regardless of their fairness, serves the interests of no one.

C. The Third Circuit's justifications for ignoring the settlement are uniformly unpersuasive.

In light of the language, structure and purposes of Rule 23, the overwhelming authority contrary to its approach, and the severe consequences of that approach, one would expect the Third Circuit to have offered powerful reasons for striking off on its own path. Neither the opinion below nor the prior decision in *GM Trucks*, however, offers any substantial justification for ignoring the settlement in determining whether to certify a settlement class.

The Third Circuit offers two ostensible justifications, neither of which provides even a colorable basis for the court's approach.*

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* A third justification offered by the court below — the argument that Rule 23 contains no "special, liberalized criteria" for settlement class actions — is addressed at pp. 17-19, *supra*.

1. The *GM Trucks* court expressed the fear that certifying a settlement class that would not qualify for certification as a litigation class somehow "perverts the class action process and converts a federal court into a mediation forum for cases that belong elsewhere, usually in state court," thereby threatening "a result inconsistent with [the federal courts'] mission and limited resources." 55 F.3d at 799. The court below may have been echoing this view in suggesting that its approach was necessary to preserve "the integrity of the judicial system" and its "institutional values." Pet. App. 17a-18a.

This argument has things exactly backwards. It apparently operates on the premise that the cases resolved by settlement class actions would, but for the availability of that mechanism, proceed "elsewhere, usually in state court." The fact, however, is that a large proportion of the cases that settlement class actions aim to resolve is *already* being litigated in the federal courts, through diversity jurisdiction or otherwise. For example, asbestos claims — the subject of this settlement — constituted fully *six percent* of all federal civil cases filed in 1990, and almost *30,000* federal asbestos cases were pending as of mid-1991. *See, e.g.*, Pet. App. 112a-113a. Indeed, as noted above, the negotiations leading up to this settlement originated as part of the *federal* MDL efforts to attain an overall resolution of the deluge of asbestos cases plaguing the *federal* courts. *See* pp. 5-6, *supra*. Moreover, as also discussed above (pp. 25-26), the Third Circuit's blanket rule affects not only tort actions, but also securities fraud, antitrust and other actions arising under federal law that are by definition subject to federal jurisdiction.

And the court below's related suggestion that restrictions on the availability of settlement classes are necessary to avoid depletion of the federal courts' "limited resources" is truly odd. As courts and commentators have repeatedly lamented, the greatest threat to the limited resources of the federal courts is the wasteful and repetitive *individual* litigation of similar claims, in asbestos and other areas. *See In re Joint E.*

& S. Dist. Asbestos Litig. ("Johns-Manville"), 129 B.R. 710, 746 (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993) ("The large number of asbestos lawsuits pending throughout the country threatens to overwhelm the courts and deprive all litigants, in asbestos as well as other civil cases, of meaningful resolution of their claims."); Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation at 26 (1991) ("The delays and burdens on the judicial system caused by the massive number of claims result in a denial of access to justice to Americans throughout the country."). One of the signal advantages of the settlement class action is its ability to *preserve* judicial resources by resolving these claims efficiently in a single proceeding.

Finally, the Third Circuit's suggestion that it is somehow not part of the legitimate business of the federal courts to promote the settlement of disputes — a suggestion implicit in its pejorative use of the phrase "mediation forum" — is simply incorrect. Not only is there a strong public interest favoring settlement generally, *e.g.*, *McDermott, Inc.* v. *AmClyde Inc.*, 114 S. Ct. 1461, 1468 (1994), but the Federal Rules of Civil Procedure specifically contemplate an active role for federal district courts in this regard. *See* Fed. R. Civ. P. 16(a)(5) ("facilitating . . . settlement" a proper purpose of pretrial conference); Fed. R. Civ. P. 16(c)(9) ("court may take appropriate action, with respect to . . . settlement").

2. The second basis cited in support of the Third Circuit's approach is the assertion that settlement class actions are susceptible to collusion on the part of class counsel pursuing attorneys' fees: "because the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with the defendants by underselling the plaintiffs' claims." *GM Trucks*, 55 F.3d at 788; *see also id.* at 795-96.

The Plaintiff Class fully supports vigorous, non-collusive representation, but does not understand how the Third Circuit's approach is an appropriate way to respond to its articulated concerns. To the extent there is any fear that attorneys will "jockey[ ] for position" by "cut[ting] a deal with the defendants," the same concern exists in *all* class settlements reached prior to an official appointment of class counsel, *regardless* of whether the particular action could or could not be certified as a litigation class action.*

For example, in securities fraud actions — the paradigmatic area of litigation class actions — it has become common for numerous similar complaints arising out of the same fraud to be filed by numerous counsel each claiming to represent the same class. *See, e.g., San Leandro Emergency Med. Group Profit Sharing Plan* v. *Philip Morris Cos.*, 75 F.3d 801, 805 (2d Cir. 1996). Often, class settlements are negotiated with some of those counsel prior to a formal class certification ruling. The Third Circuit's stated concern about counsel "jockeying" for position is, if anything, *more* applicable to these actions, but that court paradoxically would view these settlements with *less* suspicion on the entirely irrelevant ground that the cases could likely be litigated (at least as to liability issues) on a class basis. The Third Circuit's focus on whether a hypothetical litigation class could be certified, in other words, is not rationally related to its stated goal of weeding out those class settlements that are more likely to suffer from collusion.

More fundamentally, the Third Circuit's approach is not only an arbitrary response to concerns about collusion, it is an entirely unnecessary one as well. Rule 23(e) *already* contains safeguards against collusive class settlements, requiring dis-

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* We stress, moreover, that this theoretical concern is completely misplaced as applied to this case. As set forth above, the district court's findings, none of which was reversed by the Third Circuit, squarely refute any notion that class counsel acted collusively or did not adequately represent the class.

trict courts and courts of appeals to find class settlements to be fair and non-collusive prior to approving them*; moreover, these safeguards are supplemented in the settlement class context by the court's additional obligation to determine, at the same time, whether Rule 23(a) and 23(b) requirements (including adequacy of representation) have been satisfied. Nor is there any reason to think that the fairness hearing process — which is relied upon to protect class members against collusive settlements in all other contexts — becomes somehow inadequate in the case of pre-class-certification settlements.** Indeed, in *GM Trucks* itself, the Third Circuit determined as an alternative holding that the class settlement before it was unfair and hence invalid under Rule 23(e) (*see* 55 F.3d at 804-19), thus demonstrating graphically the lack of need for its adoption of a prophylactic bar to class certification. In any event, if any augmentation of the fairness hearing process is deemed necessary it should consist of additional procedures sharpening the review of the *particular* settlement before the court — such as requiring special masters or guardians ad litem to evaluate specific aspects of the settle-

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* That inquiry, in fact, is the entire purpose of a fairness hearing on the settlement, such as the elaborate one conducted by the district court here. *See, e.g., GM Trucks*, 55 F.3d at 785; *Reed* v. *General Motors Corp*, 703 F.2d 170, 172 (5th Cir. 1983). Indeed, fairness hearings are a *particularly* effective means of ferreting out collusion of the sort feared by *GM Trucks*, in which potential class counsel bid against each other (at the class members' expense) to reach a settlement with the defendant. If any such "jockeying" were ever to take place, counsel whose offers were rejected in favor of the one ultimately accepted would be highly likely to appear at the fairness hearing and expose the negotiation process to the court.

** The claim that class action settlements are susceptible to collusion and conflicting interests of class counsel hardly applies only to the "settlement class" context at issue here; it is also regularly made, by critics like respondents' expert Professor Coffee, with respect to settlements reached *after* a ruling certifying the class. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 714-18 (1986).

ment (as was done here) — and not the arbitrary and overbroad prohibition adopted by the court below that precludes class settlements *without* regard to their individual merit.

Indeed, the Third Circuit's approach is affirmatively *harmful* to the interests of plaintiff class members. In its zeal to protect class members from even the slightest theoretical risk of a collusive settlement, the court below has truly thrown out the baby with the bathwater. Its approach surely protects plaintiffs against collusive pre-certification settlements, but only at the enormous cost of "protecting" them against even the most indisputably *beneficial* of class action settlements. This "protection" will be cold comfort to asbestos plaintiffs relegated to the extraordinary transaction costs and endless delay that the tort system has in store for them.

* * *

The Plaintiff Class submits that once the settlement in this case is taken into account, it is plain that the district court's decision to certify the class herein was correct, and this Court should so find. Rather than belabor this point, the Plaintiff Class adopts the legal arguments of petitioners in this regard.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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December 16, 1996

ADDENDUM

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RULE INVOLVED

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corre-

sponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order

under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.